



FEDERAL ELECTION COMMISSION
Washington, DC 20463

JUN 18 2014

FACSIMILE NO: (916) 442-7759

Charles H. Bell, Jr.
Bell, McAndrews & Hiltachk, LLP
4555 Capitol Mall
Suite 600
Sacramento, California 95814

RE: MUR 6773

Dear Mr. Bell:

On January 17, 2014, the Federal Election Commission notified your clients of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, and information supplied by you, the Commission, on June 10, 2014, voted to dismiss this matter. The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed for your information.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009).

If you have any questions, please contact Kimberly Hart, the attorney, assigned to this matter, at (202) 694-1650.

Sincerely,


Mark Shortkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

cc: Brian Nestande
2150 River Plaza Drive
Suite 150
Sacramento, California 95833

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Brian Nestande
Nestande for Assembly 2012
Brian Nestande Officeholder Committee,
Assembly 2012
Nestande for Congress and David Bauer
in his official capacity as treasurer

I. INTRODUCTION

Brian Nestande is both a member of the California State Assembly and a candidate for the U.S. House of Representatives from California's 36th Congressional District. The Complaint in this matter alleges that Nestande and Nestande for Congress ("Federal Committee") violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by accepting non-federal funds and in-kind contributions from two committees associated with Nestande's role as a state Assemblyman: Nestande for Assembly 2012 ("State Campaign Committee") and Brian Nestande Officeholder Committee, Assembly 2012 ("State Officeholder Committee"). The Complaint further alleges that the Federal Committee violated the reporting provisions of the Act by failing to disclose these in-kind contributions from the state committees.

Respondents deny the allegations, asserting that the state committee expenditures at issue were not related to Nestande's exploration of federal candidacy, but rather to his duties as a state officeholder. The Response does not, however, address the alleged in-kind contribution resulting from the transfer of a State Campaign Committee mailer to the Federal Committee.

Based on the circumstances, the Commission concludes that pursuing this matter further would not be an efficient use of the Commission's resources and, thus, exercises its prosecutorial discretion to dismiss the allegations in this matter. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

II. FACTUAL BACKGROUND

The State Campaign Committee first qualified as a state political committee under the California Code, thus triggering registration and semi-annual reporting requirements with the California Fair Political Practices Commission ("CFPPC"), on December 16, 2010.¹ During the 2012 election cycle, it raised a total of \$354,432 and spent a total of \$339,270. *See* Nestande for Assembly 2012 CFPPC Semi-Annual Statement at 3 (Jan. 26, 2013). During the current election cycle, it raised no funds and spent \$140,647 through December 31, 2013. *See* Nestande for Assembly 2012 CFPPC Semi-Annual Statement at 3 (Jan. 31, 2014).

California law allows an elected state officer to establish an "officeholder controlled committee" separate from his campaign committee. *See* Cal. Gov't. Code § 18531.62. Such officeholder committees must file statements and reports with the CFPPC in the same manner as campaign committees. *Id.* § 18531.62(c)(3). On May 15, 2013, the State Officeholder Committee received its first contribution, consequently qualifying as a committee under California Code. *See* Brian Nestande Officeholder Committee, Assembly 2012 CFPPC Semi-Annual Statement at 4 (July 31, 2013); Amended Statement of Organization (Dec. 27, 2013).² The State Officeholder Committee raised \$25,134 and spent \$17,195 through December 31,

¹ Under California law, a committee is any person or combination of persons who directly or indirectly receives contributions of \$1,000 or more during a calendar year, makes independent expenditures of \$1,000 or more during a calendar year, or makes contributions of \$10,000 or more to or at the behest of candidates or committees during a calendar year. Cal. Gov't. Code, § 82013. Committees must file Statements of Organization with the CFPPC within ten days of becoming a committee, Cal. Gov't. Code § 84101, and file semi-annual reports disclosing their financial activity. Cal. Gov't. Code § 84200. Although the State Campaign Committee acknowledges that it qualified as a committee under the California Code as of December 16, 2010 — and filed the appropriate statements with the CFPPC from that date forward — it did not file its Statement of Organization with the CFPPC until December 27, 2013. *See* Nestande for Assembly 2012 CFPPC Statement of Organization (Dec. 27, 2013).

² The committee's initial Statement of Organization does not appear to be available online. Its Amended Statement of Organization, however, confirms that it qualified as a committee on May 15, 2013.

2013. See Brian Nestande Officeholder Committee, Assembly 2012 CFPPC Semi-Annual Statement at 3 (Jan. 31, 2014).

During the current election cycle, the expenditures made by the State Campaign Committee and the State Officeholder Committee include:

Table 1. State Campaign Committee Expenditures, January-June 2013

| Expenditure Code: Campaign Consultants | | |
|---|---------------------------------|------------|
| Date | Payee | Amount |
| 1/4/13 | Jennifer Urquiza | \$1,500 |
| 1/30/13 | Lupe Watson | \$1,000 |
| 3/20/13 | The Cullen Group, LLC | \$2,000 |
| 4/3/13 | Alan Denz | \$2,500 |
| 4/10/13 | Marc Troast | \$5,000 |
| Total: | | \$12,000 |
| Expenditure Code: Voter Registration | | |
| Date | Payee | Amount |
| 4/10/13 | Republican Organizing Committee | \$2,500 |
| 5/23/13 | American Express | \$5,550 |
| Total: | | \$8,050 |
| Expenditure Code: Radio Airtime and Production Costs | | |
| Date | Payee | Amount |
| 5/7/13 | The Battin Group | \$9,000 |
| Total: | | \$9,000 |
| Expenditure Code: Candidate/Staff/Spouse Travel, Lodging, Meals [Memo: Travel to Washington, DC, Dec. 16-17, 2012] | | |
| Date ³ | Payee | Amount |
| — | American Airlines | \$1,740.40 |
| — | Marriott International | \$939.96 |
| — | Capital Grille | \$219.80 |
| Total: | | \$2,900.16 |

See Nestande for Assembly 2012 CFPPC Semi-Annual Statement (July 31, 2013); *see also* Nestande for Assembly 2012 "Expenditures Made," <http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1334108&view=expenditures>

³ While these expenditures were disclosed on the committee's Semi-Annual Statement covering January through June 2013, the committee paid for this expenditure via its American Express credit card and therefore the exact date of payment was not reported. See Nestande for Assembly 2012 CFPPC Semi-Annual Statement at 29-30 (July 31, 2013).

(California Secretary of State online system allowing committee disclosure data to be displayed and sorted by various categories and also providing dates of expenditures).

Table 2. State Officeholder Committee Expenditures, January-June 2013

| Expenditure Code: Campaign Consultants | | |
|--|--------------|------------|
| Date | Payee | Amount |
| 6/2/13 | Rob Flanigan | \$675.00 |
| 6/11/13 | Rob Flanigan | \$1,185.00 |
| Total: | | \$1,860.00 |

See Brian Nestande Officeholder Committee, Assembly 2012 CFPPC Semi-Annual Statement (July 31, 2013); *see also* Brian Nestande Officeholder Committee, Assembly 2012 “Expenditures Made,” <http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1356179&view=expenditures> (providing dates of expenditures).

On April 18, 2013, Nestande filed his Statement of Candidacy for the U.S. House of Representatives. Brian Nestande Statement of Candidacy (Apr. 18, 2013). The Federal Committee filed its Statement of Organization on April 15, 2013, naming David Bauer as its treasurer. Nestande for Congress Statement of Organization (Apr. 15, 2013). Its first report filed with the Commission disclosed two contributions and one expenditure — totaling \$4,598.93 and \$1,998.93, respectively — made prior to April 18, 2013, during Nestande’s testing the waters period. Amended 2013 July Quarterly Rpt. at 6, 34, 45 (Aug. 8, 2013). The Federal Committee raised a total of \$596,729 and spent \$273,988 through the period ending March 30, 2014. Nestande for Congress 2014 Apr. Quarterly Rpt. at 3-4 (Apr. 15, 2014).

Based on the spending described above, the Complaint alleges that Nestande and his Federal Committee accepted non-federal funds from his two state committees to pay for expenses incurred in connection with his exploration of federal candidacy. Compl. at 1, 3-5.

1 The Complaint notes the state committees' "high level of campaign activity in the first half
2 of 2013" — despite Nestande not being a state candidate in the 2013-2014 election cycle — in
3 comparison to the Federal Committee making "virtually no expenditures" leading up to
4 Nestande's announcement of federal candidacy. *Id.* at 3-4.

5 The Complaint asserts that the state committees' 2013 spending was twice as high as in
6 previous non-election years, specifically pointing to the following expenditures from the first
7 half of that year as evidence of federal campaign activity:

- 8 • \$13,861 for campaign consulting services, including payments to a firm based in the
9 Washington, D.C. area not previously used by the state committee;
- 10 • \$8,293 for voter registration activities;
- 11 • \$16,649 for radio production and air time costs, which constitutes the first time the state
12 committee incurred radio expenses in a non-election year; and
- 13 • \$2,928 for travel, lodging, and meals in connection with a trip to Washington, D.C., "just
14 months before" Nestande filed his Statement of Candidacy. *Id.* at 3.

15
16 In addition to this spending, the Complaint alleges that the Federal Committee accepted
17 the transfer of an asset from the State Campaign Committee in violation of the Act. *Id.* at 6. The
18 Complaint states that, "for several months," the Federal Committee's website
19 (www.briannestande.com) included a menu option labeled "Brian Intro" that linked to a PDF of
20 a State Campaign Committee mailer. *Id.* at 4. The mailer, included as an attachment to the
21 Complaint, features several photographs of Nestande and quotes from supporters of his state
22 candidacy, but makes no reference to his federal candidacy. *Id.*, Attach. It also displays the
23 "Nestande for Assembly" logo and a disclaimer stating that the mailer was paid for by Nestande
24 for Assembly 2012. *Id.*

1 Finally, the Complaint alleges that the Federal Committee should have disclosed these in-
2 kind contributions from the state committees on its regular disclosure reports. *Id.* at 6. By
3 failing to do so, the Federal Committee allegedly violated the reporting provisions of the Act. *Id.*

4 Respondents filed a collective response denying the allegations and asserting that every
5 expenditure by the state committees "was properly and legally spent" in compliance with
6 California law and that "[n]one was for a federal campaign purpose." Resp. at 1. The Response
7 also specifically addresses the expenditures alleged to have been made for exploratory campaign
8 purposes. With regard to these expenditures, Respondents maintain that:

- 9 • The campaign consultants were "properly compensated for services related to state
10 political and legislative advice and research, and for providing additional professional
11 services to Nestande's state campaign committee for officeholding expenses in his role as
12 an elected state legislator." *Id.* at 2.
- 13 • The state committees made one \$2,500 payment to the Riverside County Republican
14 Party Voter Registration Committee, where there "are competitive state legislative
15 districts." *Id.* at 2-3.
- 16 • The expenditures for radio production and air time were for the purpose of promoting the
17 Assembly's Salton Sea license plate legislation; they encouraged students to compete to
18 design the plate. None of the radio expenditures were public communications, contained
19 express advocacy, or identified Nestande as a potential or actual candidate for federal
20 office. *Id.* at 2.
- 21 • Nestande traveled to Washington, D.C., to meet with Members of Congress "to find
22 champions on issues of concern, share policy perspectives and seek assistance on state
23 and local issues." As a state legislator, Nestande attends to several federal issues, such as
24 federal land holdings in his district and state budget issues impacted by the federal
25 budget. *Id.*

26 Unlike the alleged exploratory expenditures, however, the Response does not address the
27 allegation that a State Campaign Committee mailer appeared on the Federal Committee's
28 website.

III. LEGAL ANALYSIS

Under the Act, a federal candidate or an entity directly or indirectly established, financed, maintained, or controlled by or acting on behalf of that candidate is prohibited from soliciting, receiving, directing, transferring, or spending funds in connection with an election for federal office that are not subject to the limits, prohibitions, and reporting requirements of the Act.

2 U.S.C. § 441i(e). California law allows state candidates to accept up to \$4,100 per election from individuals, corporations, and labor unions. Cal. Gov't. Code §§ 18545, 82047, 85301.

Thus, contributions made to Nestande's California state committee are not subject to the limits and prohibitions of the Act. *See* 2 U.S.C. §§ 441a(a)(1), 441b. Furthermore, Commission regulations prohibit the transfer of funds or assets from a candidate's nonfederal campaign committee to his or her federal principal campaign committee. 11 C.F.R. § 110.3(d).

1. Testing the Waters Activities

Funds received and payments made solely for the purpose of determining whether an individual should become a candidate are not considered contributions or expenditures under the Act. 11 C.F.R. §§ 100.72, 100.131. These funds are, however, subject to the limitations and prohibitions of the Act, and the individual is required to keep records of them. *Id.* If the individual becomes a candidate, the funds become contributions and expenditures, and are subject to the reporting requirements of the Act. *Id.* As such, the Commission has previously considered funds spent by a state candidate's campaign committee for the purpose of exploring federal candidacy to be a transfer from the state committee to the subsequent candidate's federal

1 committee. *See* Factual & Legal Analysis at 4-5, MUR 6267 (Jonathan Paton for Congress);
2 Factual & Legal Analysis at 2-6, MUR 5480 (Levetan for Congress).⁴

3 The Complaint alleges that Nestande and his Federal Committee accepted non-federal
4 funds from his two state committees to pay for expenses incurred in connection with his
5 exploration of federal candidacy. Compl. at 1, 3-5. Specifically, the Complaint's alleges that the
6 state committees' high level of spending as a whole — during a non-election year preceding
7 Nestande's federal candidacy — indicates that the state committees were supporting Nestande's
8 federal candidacy. Compl. at 3. Nestande's counsel generally denies the allegations that the state
9 committees funded activities related to Nestande's federal candidacy and provides some
10 description of the non-federal expenditures that the state committees made. Resp. at 1.

11 Given the assertions in the complaint and response, the available information is
12 insufficient to indicate whether there is reason to believe a violation occurred. Nevertheless,
13 based on the circumstances, the Commission concludes that pursuing this matter further would
14 not be an efficient use of the Commission's resources. Accordingly, the Commission exercises
15 its prosecutorial discretion to dismiss the allegations regarding the alleged exploratory activity.

⁴ In both of these matters, the Commission found reason to believe that the candidate, the state campaign committee, and the federal campaign committee violated 2 U.S.C. § 441i(e) and 11 C.F.R. § 100.3(d) based on the state campaign committee's payment for polling that benefited the testing the waters phase of the candidate's federal candidacy. *See id.*

2. State Campaign Mailer

Respondents do not address the Complaint's allegation that a PDF of a State Campaign Committee mailer appeared on the Federal Committee's website for several months. Based on the available information, it appears that the State Campaign Committee transferred an asset to the Federal Committee, and thus made an in-kind contribution to the Federal Committee. *See* F&LA at 9, MURs 6474/6534 (characterizing a newsletter about the candidate on his federal committee website as a potential in-kind contribution); Factual & Legal Analysis at 4, MUR 5636 (Russ Diamond) (characterizing state campaign website containing information about policy positions and references to both state and federal campaigns as an asset shared between state and federal committees).

The value of this transferred asset, however, would likely be *de minimis*. Although the mailer extols Nestande's positive qualities as a leader, it promotes his state candidacy rather than his federal candidacy. *See* Compl., Attach. In fact, it appears to be an artifact from his 2012 state candidacy and makes no reference to his federal candidacy whatsoever. *Id.* Accordingly, the Commission exercised its prosecutorial discretion and dismissed the allegation that Respondents violated 2 U.S.C. § 441i(e)(1) and 11 C.F.R. § 110.3(d) regarding the campaign mailer, pursuant to *Heckler v. Chaney*, 470 U.S. 821 (1985).

3. Reporting Requirements

The Complaint alleges that the Federal Committee failed to disclose the alleged contributions from the state committees. Compl. at 6. Political committees are required to disclose all contributions, including in-kind contributions, from persons other than political committees. 2 U.S.C. § 434(b)(2)(A); 11 C.F.R. § 100.52(d)(1). Accordingly, if the Federal

1 Committee had accepted a transfer of funds or assets from either state committee, it should have
2 disclosed those assets as in-kind contributions.

3 As discussed above, however, it does not appear that either state committee transferred
4 funds or assets to the Federal Committee for testing the waters activities. Additionally, although
5 the Federal Committee should have disclosed the transfer of the mailer that appeared on its
6 website, the value of this transfer, and thus the amount to be reported, is most likely *de minimis*.
7 Accordingly, the Commission dismissed the allegation the Federal Committee violated 2 U.S.C.
8 § 434(b).

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